

COA No. 29017-4-III

FILED

JAN 18 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RICARDO LEE AGUILAR, Appellant.

REPLY BRIEF OF APPELLANT

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I. THE TIMING OF THE ORDER CLARIFYING JUDGMENT AND SENTENCE

The December 29, 2008 Order Clarifying Judgment and Sentence was entered while Mr. Aguilar's first appeal was pending. The record also does not reflect an RAP 7.2(e) order permitting entry of the order, which clearly changed the decision on appeal. The notice of appeal was filed in April 2008 and this Court's unpublished opinion affirming the denial of the motion to withdraw guilty plea was filed on September 3, 2009. (CP 26-41; Supp. CP 97-98, 99-101).

This Court's opinion, however, makes no mention whatsoever of the Order Clarifying Judgment and Sentence. (CP 26-41). Although the order appears in the clerk's papers, it simply was not addressed in Mr. Aguilar's first appeal. This Court clearly did not pass on the propriety of the Order Clarifying Judgment and Sentence. Therefore, Mr. Aguilar's appeal here is neither time-barred nor a repetitive petition. RCW 10.73.090; RCW 10.73.140.

II. CONTRARY TO THE STATE'S CONTENTION, *IN RE BROOKS* DOES NOT CURE THE ERROR IN MR. AGUILAR'S SENTENCE.

The State argues Mr. Aguilar's sentence was not in "excess of law." It points to this language in the Order Clarifying

Judgment and Sentence: "The actual number of months of total confinement including community custody shall not exceed 120 months." (CP 100). The State relies on *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009), to justify the 152-month sentence imposed for count 6, unlawful possession of a firearm in the first degree, a class B felony carrying a statutory maximum term of 10 years (120 months) and a \$20,000 fine. RCW 9A.20.020(1)(b). Its reliance is misplaced.

Mr. Aguilar's argument is hardly an afterthought as suggested by the State since an illegal sentence of 32 months over the maximum term is indeed illegal and in "excess of law." Under RCW 9.94A.533(3), if the offender is being sentenced for more than one offense, any firearm enhancement must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to that enhancement. The Order Clarifying Judgment and Sentence changed the term in count 3, the offense subject to the firearm enhancement, from 120 months to 84 months in an attempt to stay within the allowable maximum sentence. That count also included 9-12 months of community custody. *Brooks* held that even though a combination of total confinement and community custody may exceed the statutory

maximum, any infirmity was cured by a recitation that under no circumstances could the offender serve more than the statutory maxim. 166 Wn.2d at 673. Thus, the sentence in count 3 comports with the plea bargain.

Count 6, however, carries no community custody. The Order Clarifying Judgment and Sentence failed to take into account the effect of the 36-month firearm enhancement on the 116-month sentence imposed, which thus ended up being a 152-month sentence. The court, as it did in count 3, should have subtracted the 36 months for the enhancement from the 116-month sentence imposed to stay within the 120-month maximum. It did not. The Supreme Court held in *Brooks*:

We hold that when a defendant is sentenced to a term of confinement and community custody that has the potential to exceed the statutory maximum for the crime, the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and custody shall not exceed the statutory maximum. 166 Wn.2d at 675.

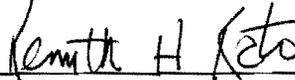
Brooks does not apply here because no community custody is involved, the sentence is determinate, and the sentence exceeds the statutory maximum. See 166 Wn.2d at 672-73.

Brooks is neither the cure nor the remedy here. The court had its chance to clarify the judgment and sentence and, in so doing, it still imposed an invalid sentence. The 152-month sentence for count 6 did not potentially exceed the statutory maximum; it did exceed the statutory maximum on its face. No magic language from *Brooks* can save this illegal sentence. It bears repeating that the State breached its plea agreement by “clarifying” the judgment and sentence to impose a sentence beyond the 120 months Mr. Aguilar bargained for. That breach is a manifest injustice. *State v. Taylor*, 83 Wn.2d 594, 597, 521 P.2d 699 (1974). Mr. Aguilar should be allowed to withdraw his guilty pleas to all three offenses as he does not have to show manifest injustice on each count when his plea agreement was a package deal. *State v. Turley*, 149 Wn.2d 395, 69 P.3d 338 (2003).

III. CONCLUSION

Based on the foregoing facts and authorities, Mr. Aguilar respectfully urges this Court to reverse the denial of his motion to withdraw guilty plea, reverse his convictions, and remand to allow him to withdraw his guilty plea.

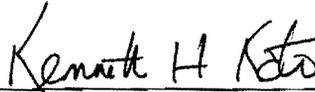
DATED this 18th day of January, 2011.



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CERTIFICATE OF SERVICE

I, Kenneth H. Kato, hereby certify that on January 18, 2011, I caused a true and correct copy of the Reply Brief of Appellant to be served on the following by first class mail, postage prepaid: Teresa Chen, Attorney at Law, PO Box 40, Soap Lake, WA 98851-0040; and Ricardo Lee Aguilar, #746222, Coyote Ridge Corr. Ctr., PO Box 769, Connell, WA 99326.



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